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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000982-MR

RICKY LYNN ESTES AND
DONNA ESTES — APPELLANTS

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 07-CI-00189

TROY THOMPSON AND
RAY CAUDILL, in his individual
and official capacity as the former
sheriff of Clark County — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND DIXON, JUDGES.

CLAYTON, JUDGE: Ricky and Donna Estes (Estes), appeal the Clark Circuit Court grant of summary judgment in favor of the appellees, Troy Thompson (Thompson), and Ray Caudill (Caudill). The circuit court granted summary

judgment to Thompson and Caudill based on its judgment that the Estes' claims are barred by the exclusive remedy provision of the Kentucky's Workers' Compensation Act (Act). For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises from an automobile accident involving Estes and Thompson. At the time of the accident, Estes was a full-time deputy, and Thompson was a volunteer deputy sheriff. They both worked for the Clark County Sheriff's Office. On October 29, 2006, the Clark County Sheriff's Office received an emergency call from Powell County law enforcement. Powell County law enforcement alerted the sheriff's office about a black Chevrolet Cavalier reportedly on the Mountain Parkway heading towards Clark County. The car was allegedly occupied by three individuals who had previously participated in an armed robbery in Powell County. Estes responded to the call from the Clark County dispatcher as did Thompson, who was on-call at the time of the report. They were driving separate vehicles.

Estes and Thompson met in a turn-around area in the median of Mountain Parkway. Estes instructed Thompson to follow him down Mountain Parkway toward Powell County and attempt to locate the suspicious vehicle. Both deputies engaged their emergency flashing lights and sirens. As Estes proceeded down the highway, he noticed two vehicles parked on the right shoulder with their emergency lights flashing and the occupants standing outside the vehicles. As a result of his observation, Estes slowed his vehicle to inspect the stopped cars and

speak with the occupants. While doing so, he deactivated his siren but kept his flashing lights on. After determining that neither vehicle was the black Chevrolet he was looking for, Estes reactivated his siren and continued driving down the Parkway.

At the time Estes was stopped in the right lane of traffic, Thompson was approaching from the rear at a high rate of speed. There was a rise in the highway that temporarily obstructed his view of Estes' vehicle. Thompson was unaware that Estes was traveling at a severely reduced rate of speed and was unable to stop. His vehicle collided with Estes' vehicle. Thompson had his siren and flashing lights activated when he struck Estes from behind. As a result of the collision, Estes and Thompson were both badly injured.

Estes and Thompson both filed claims under the Workers' Compensation Act for injuries suffered in the collision. Thompson, as a volunteer deputy sheriff, was able to file a workers' compensation claim. Clark County Fiscal Court had a longstanding practice to classify special deputies, like Thompson, as "employees" for purposes of workers' compensation. This practice was authorized by Clark County's insurance carrier, Kentucky Association of Counties All Lines Fund Trust (KACo). And both Estes and Thompson received workers' compensation benefits for the injuries sustained in the accident.

After receiving workers' compensation benefits, Estes and his wife brought suit in the Clark Circuit Court. They asserted several causes of actions against the Clark County Sheriff, Berl Perdue (Perdue), Thompson and Caudill,

including negligence, vicarious liability, negligent supervision, and loss of consortium. On June 1, 2007, the circuit court dismissed Perdue as a defendant in both his individual and official capacity. The circuit court reserved judgment on the Estes' claims against Thompson and Caudill pending limited discovery on the issue of whether the Estes' claims were barred by the exclusive remedy provisions of Kentucky Revised Statutes (KRS) 342.690. Ultimately, on April 23, 2008, the circuit court entered summary judgment for Thompson and Caudill, which dismissed all claims against them on the grounds that the claims are barred by the exclusive remedy provision of KRS 342.690. Thereafter, the Esteses filed an appeal on May 21, 2008.

ISSUES

On appeal, Estes argues that the circuit court incorrectly granted summary judgment because there were genuine issues of material fact. He argues that Thompson was not entitled to claim KRS 342.690 as a defense because special deputies are not "employees" for the purposes of the Act. Moreover, even if special deputies under the Act are considered "employees," Estes asserts that Thompson's appointment as a special deputy was invalid, and therefore, he could not be classified as an "employee" under the Act. Next, Estes contends that another issue of fact exists as to whether Thompson was acting outside the course and scope of his employment. Finally, Estes claims the circuit court erred in granting summary judgment to Caudill because, according to Estes, it is not clear

that Caudill can claim KRS 342.690 as a defense because he is not an employer of Thompson but a co-employee and was acting outside the scope of his employment.

STANDARD OF REVIEW

In reviewing a grant of summary judgment, we focus on whether the trial court correctly found "that there [was] no genuine issue as to any material fact and [therefore] the moving party [was] entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Further, conclusions of law are reviewed *de novo* on appeal. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005). Likewise, the interpretation and construction of a statute is a matter of law for the court to decide. *City of Worthington Hills v. Worthington Fire Protection Dist.*, 140 S.W.3d 584 (Ky. App. 2004). These principles of review will guide our actions.

ANALYSIS

1. The Act's exclusive remedy

Before addressing the appealed issues, we will provide the statutory precepts contained in KRS 342.690(1):

> If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all

> other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death.

Hence, the benefits under the Act are the exclusive remedy for work-related injuries, assuming certain requirements, such as securing workers' compensation insurance by the employer, are met. In addition, the employer's exemption from liability also extends to employer's insurance carrier, employees, officers or directors. One exception to the liability exemption is in cases where the injury is intentionally caused by an employee, officer or director. *Id.*

2. Thompson's status as an employee

Having noted the exclusive remedy provision of the Act, we first consider Estes' allegation that under Kentucky law unpaid volunteers such as Thompson are not "employees" subject to the Act. Contrary to this assertion, the circuit court found that Thompson, a volunteer special deputy, was an employee of the Clark County Sheriff's Office for purposes of the Act.

The Act defines five different types of employees in KRS 342.640. The statutory section pertinent to our discussion is KRS 342.640(3). We cite this subsection in full:

> *Every person in the service of the state or any of its political subdivisions or agencies, or of any county, city of any class, school district, drainage district, tax district, public or quasipublic corporation, or other political entity, under any contract of hire, express or implied*, and every official or officer of those entities, whether elected or appointed, while performing his

> official duties shall be considered an employee of the state. Every person who is a member of a volunteer ambulance service, fire, or police department shall be deemed, for the purposes of this chapter, to be in the employment of the political subdivision of the state where the department is organized. Every person who is a regularly-enrolled volunteer member or trainee of an emergency management agency, as established under KRS Chapters 39A to 39E, shall be deemed, for the purposes of this chapter, to be in the employment of this state. Every person who is a member of the Kentucky National Guard, while the person is on state active duty as defined in KRS 38.010(4), shall be deemed, for the purposes of this chapter, to be in the employment of this state[.] (Emphasis added).

In his brief, Estes cites the portion of the statute in italics to support the proposition that Thompson was not an employee - he was not under contract for hire. But, as pointed out by Thompson, Estes neglects to consider the next portion of the statutory language in this section, which says "[e]very person who is a member of a volunteer ambulance service, fire, or police department shall be deemed, for the purposes of this chapter, to be in the employment of the political subdivision of the state where the department is organized." *Id.* Hence, this section of the statute provides that a person who is a member of a volunteer police department is deemed to be in the employment of a subdivision of the state. Hence, under this language, Thompson was an employee for purposes of the Act.

Estes cites several cases to support his rationale that Thompson, as a volunteer, can never be considered an employee under the Act. We are not persuaded by these cases. Four of the five are not relevant to the facts of the case here because they discuss employment in the private sector, and thus, are outside

the purview of KRS 342.640(3). The other case, *Comm., Dept. of Educ., Div. of Surplus Properties v. Smith*, 759 S.W.2d 56 (Ky. 1988), held that a prisoner was not a volunteer and was not considered under a contract for hire because prison labor could not be considered voluntary.

The circuit court in its decision ascertaining that Thompson was an employee for purposes of the act relied on *Highland Heights Volunteer Fire Dept. v. Ellis*, 160 S.W.3d 768 (Ky. 2005). Estes disputes the circuit court's interpretation of the case. In *Ellis*, the Court explained the exception to the requirement that a person must be paid in order to receive workers' compensation benefits:

> Chapter 342 generally does not cover individuals unless they are paid to work under a "contract of hire," but KRS 342.640(3) provides an exception for volunteer fire, police, and emergency personnel although their work is gratuitous or nearly gratuitous. Such individuals are covered by the Act as "deemed employees" of the political subdivision where the department for which they work is organized. *Id.* at 770.

Estes suggests that the circuit court's reliance was improper because the case involved a volunteer police department rather than a county sheriff's office. Given the plain language of the Court's statement in *Ellis*, we disagree with Estes' overly literal interpretation of the words "volunteer fire, police, and emergency personnel" and focus instead on the second sentence, which states, "[s]uch individuals are covered by the Act as 'deemed employees' of the political subdivision where the department for which they work is organized." The second

sentence allows a broader interpretation of the classification of volunteers allowed to be covered by workers' compensation. This interpretation is bolstered by an Opinion of the Attorney General.

> As relates to workmen's compensation for the sheriff's special deputies, it is our opinion that workmen's compensation applies to special deputy sheriffs, appointed under KRS 70.045, pursuant to KRS 342.640(3), since they are in the service of a political subdivision, i.e., the county.

1983 Ky. Op. Atty. Gen. 2-368, OAG 83-301, 1983 WL 166557 (Ky. A.G.).

Finally, courts around the country have applied various tests to determine whether an employer and employee relationship exists under workers compensation. 99 C.J.S. Workers' Compensation § 148 (June 2009). Besides the existence of a paid relationship between parties, one test that courts have applied to determine whether workers' compensation benefits are payable is whether the employer has taken out compensation insurance on "volunteer" employees. The existence of such insurance on a person is some evidence of the existence of an employer-employee relationship. *See Hartford Ins. Group v. Voyles*, 149 Ga. App. 517, 254 S.E.2d 867 (Ga. App. 1979). Since the Clark County Fiscal Court paid worker's compensation insurance for Thompson and reported his injury to KACo, they believed a relationship existed. And the fact KACo paid the workers' compensation benefits shows they too thought that, for purposes of the Act, Thompson was an employee of the Clark County Sheriff's Office. Thus, we agree

with the circuit court and conclude that Thompson was an employee, as defined in KRS 342.640(3), for purposes of workers' compensation.

3. The validity of Thompson's appointment as a special deputy

The next issue we will address is the validity of Thompson's appointment as a special deputy for the Clark County Sheriff's Office. Estes contends that Thompson's appointment as a special deputy was invalid for two reasons. First, the number of special deputies in Clark County exceeded the statutory guidelines, and second, Thompson did not meet the Clark County Sheriff's criteria for special deputies.

The statute governing the appointment of special deputies, like Thompson, is KRS 70.045. KRS 70.045(1) authorizes sheriffs of counties with populations of 10,000 or more to appoint special deputies to assist "with general law enforcement and maintenance of public order." The position of special deputy "is subject to the provisions of [KRS 70.045] only," and statute places no qualifications, training requirements, or other stipulations on persons appointed special deputy. KRS 70.045(4). In contrast, KRS 70.045(2) has no limitation on the number of special deputies that may be appointed. Special deputies appointed under this statutory section are used in emergency situations, like fire, flood, tornado, or any such scenario.

According to Thompson and Caudill, Thompson was an appointed Special Deputy of the Clark County Sheriff's Office on April 7, 2006, by Sheriff Caudill pursuant to KRS 70.045(1). Under KRS 70.045(1), Caudill was allowed to

appoint no more than fourteen special deputies. Estes states that Caudill's appointment of Thompson increased the number of special deputy sheriffs above the maximum number. The record, however, provides evidence that on the date of the accident, Clark County had not exceeded the statutory number of special deputies allowed under KRS 70.045(1). Because mere innuendo is insufficient to establish that there were more than fourteen special deputies and because the record disputes this allegation, Estes' claim regarding an excess of special deputies is not a material issue of fact.

Another issue proffered by Estes is that Thompson was not adequately trained, and consequently, could not be considered a deputy sheriff. Estes discusses in great detail the difference between deputies under KRS 70.045(1) and KRS 70.045(2). Although we have already ascertained that Thompson was serving under KRS 70.045(1), we will respond to the argument that Thompson was not validly appointed under KRS 70.045(1) because he had not received the requisite training to be a deputy sheriff.

Estes describes a training program for special deputies suggested by Caudill, which includes a newspaper article describing the plan. But the training requirements referenced by Estes were part of a "draft" special deputy manual, which was never implemented or adopted. Since the training was only a proposal, Thompson did not receive the training described. Even so, Estes cannot establish any requirement under KRS 70.045 that, in order to be a deputy sheriff, one must complete a certain amount of training. Thus, Estes establishes no evidence

regarding a lack of training that invalidates Thompson's appointment as a special deputy.

Although Estes has argued extensively that Thompson's appointment under KRS 70.045(1) is invalid, he has provided nothing to show how an invalid appointment would negate the exclusive remedy of the Act. Nor has Estes indicated that special deputy sheriffs appointed under KRS 70.045(2) would not be covered by the exclusive remedy provision of the Act. Regardless of the statutory subsection, Thompson was definitely a special deputy sheriff under KRS 70.045.

4. Thompson was outside his scope of employment

The final issue for our analysis is whether a general issue of material fact exists as to whether Thompson was acting outside the course and scope of his employment. Estes maintains that, if Thompson is deemed to be an employee covered by this Act, he acted outside the scope of his employment, and therefore, the immunity provisions of KRS 342.690 would be inapplicable. Estes cites *Kearns v. Brown*, 627 S.W.2d 589 (Ky. App. 1982), wherein this Court held that the immunity provisions of KRS 342.690 are not applicable to another employee whose actions are so far removed from those ordinarily anticipated that such employees remove themselves from the course of employment and negate the injury status as arising out of the employment. *Id.* at 591.

Estes compares the facts in this case to the one in *Kearns*. In *Kearns*, two employees were traveling together from one location to another for their

employer. The employee-passenger was killed because the employee-driver had been engaging in "horseplay," which was the proximate cause of the accident. Here, Estes and Thompson were driving separate vehicles at the time of the accident, responding to an emergency situation, and complying with their respective duties as Clark County Deputy Sheriffs. In fact, Estes had instructed Thompson before they began their search for the vehicle reported to have been involved in an armed robbery. Notably, the deputy sheriffs were not pursing an automobile but searching for one. Nothing in the record demonstrates that they were acting outside the scope of their employment. We agree with the circuit court's finding that Thompson was acting within the scope of general law enforcement duties as set forth in KRS 70.045(1).

5. Caudill entitled to use KRS 342.690 as a defense

First, Estes claims that Caudill is not entitled to use KRS 342.690 as a defense because he is not Thompson's employer but merely a co-employee. Contrary to Estes' assertion, as previously noted, KRS 342.690(1) states that the exclusive remedy of the Act protects other employees of an employer unless the other employees intentionally cause the claimant's injuries. Clearly, the exemption from liability granted to an employer by KRS 342.690(1) extends to all employees of the employer. *Fireman's Fund Ins. Co. v. Sherman & Fletcher*, 705 S.W.2d 459, 464 (Ky. 1986). The only exception, as mentioned above, is if an employee intentionally causes an injury. Estes does not provide any evidence or even any suggestion that Caudill intentionally harmed Estes.

Second, Estes alleges that Caudill acted outside the scope of his employment by improperly hiring and training Thompson, and therefore, is not entitled to the exclusive remedy of the Act. Without conceding whether this argument has validity, we will assume *arguendo* that it is accurate. Since these actions would be labeled negligence, there is no intentional harm. Negligence does not abrogate the exclusive remedy defense of the Act. The Kentucky's Supreme Court has stated "absent 'willful and unprovoked physical aggression' by an employee, officer, or director, there is no exception to the exclusive liability provision of the Workers' Compensation Act." *Shamrock Coal Co., Inc. v. Maricle*, 5 S.W.3d 130, 134 (Ky. 1999). In the case at hand, Caudill was a co-employee of Estes, committed no "willful and unprovoked physical aggression," and therefore, was entitled to the exclusive remedy defense in KRS 342.690.

Estes has alleged that both Thompson and Caudill were acting outside the scope of their employment, and therefore, should not be able to use the exclusive remedy of the Act as a defense. Nonetheless, Kentucky courts have consistently held that an employee is acting within the scope of employment when "performing work assigned by the employer or engaging in a course of conduct subject to the employer's control." *Papa John's Intern., Inc. v. McCoy*, 244 S.W.3d 44, 51 (Ky. 2008). Further, an employee is acting outside the scope of employment when the work "occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer." *Id.* Under these

criteria, Thompson and Caudill clearly were within the scope of their work requirements.

6. Donna Estes' claim for loss of consortium

Although Estes' brief did not discuss whether his wife's claim for loss of consortium was improperly dismissed in the circuit court's order of summary judgment, the prehearing statement lists it as an issue to be decided on appeal. In the interests of thoroughness, we will address this issue. In fact, previously cited language of the statute illustrates the treatment of loss of consortium claims:

> If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death.

KRS 342.690(1).

And Kentucky courts have upheld this statutory language in a literal fashion. *See Brooks v. Burkeen*, 549 S.W.2d 91, 93 (Ky. 1977), and *Hardin v. Action Graphics, Inc.*, 57 S.W.3d 844, 846 (Ky. App. 2001). Consequently, we agree with the circuit court's dismissal of Mrs. Estes' claim of loss of consortium in its summary judgment order.

CONCLUSION

Therefore, we conclude, and agree with the trial court, that for purposes of the Act, Thompson is an employee protected by the Act's exclusive remedy provision. The statute shields co-employees from liability as stated:

> The exemption from liability given an employer by this section shall also extend to such employer's carrier and to all employees, officers or directors of such employer or carrier[.]

KRS 342.690(1).

Furthermore, the circuit court did not err in also granting summary judgment to Caudill, who is protected by the exclusive remedy provision of the Act, too. Without exception, the circuit court acted appropriately and without haste. It allowed an extended period of discovery resulting in extensive briefing of the issues. We agree with its decision, and accordingly, affirm the judgment of the Clark Circuit Court.

ALL CONCUR.

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